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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONER

v.

THE HONORABLE MILES W. LORD, JUDGE,
UNITED STATES DISTRICT COURT, DISTRICT
OF MINNESOTA, ET AL.ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUITBRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY
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No. 78-942

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 585 F. 2d 860. The decision of the district court (Pet. App. 32a-41a) appears at 18 F.E.P. Cases 158. Other district court opinions in this matter are reported at 442 F. Supp. 114, 18 F.E.P. Cases 140, and at 18 F.E.P. Cases 131, 136, 167 and 169.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1978. The petition for a writ of certiorari was filed on December 12, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in refusing to grant a writ of mandamus to review a provisional class action determination.

STATEMENT

Petitioner United States Fidelity and Guaranty Company seeks review of the refusal of the court of appeals to issue a writ of mandamus to decertify a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*¹

Respondents Shelia Mead and Terry Oakley filed this action under Title VII of the Civil Rights Act of 1964, alleging that they individually, and as members of a class of former and current female employees, were subjected to company-wide discrimination based on sex with regard to professional and managerial positions.² The district court granted a conditional certification under Rule 23 of the Federal Rules of Civil Procedure. The class consists of current and former female employees and applicants for employment, who were employed in any of petitioner's facilities since July 1965. The order specifically provided that the certification was provisional in nature under Rule 23(c)(1), subject to revision and amendment at any time until final judgment.

¹Petitioner is not seeking review of the court of appeals' refusal to vacate an order granting intervention on a nationwide basis to the Equal Employment Opportunity Commission (EEOC) (Pet. 5, n.2). Prosecution by the EEOC of its nationwide action against petitioner will thus be unaffected by the disposition of the petition.

²In addition, plaintiff Mead, and the EEOC in a separate action, alleged that the company had retaliated against Mead for having filed a charge with EEOC. After a consolidated trial on that issue, the judge found that the company had engaged in acts of retaliation (Pet. App. 15a-32a).

Petitioner applied to the court of appeals for a writ of mandamus to decertify the class action. The court of appeals declined to issue the writ on the ground that the trial court did not exceed its authority in granting the class-action order. The court of appeals found that the order was based on "ample evidence before the district court to support the exercise of its discretion to certify a national class" (Pet. App. 11a).

ARGUMENT

Since petitioner does not seek review of the judgment below upholding intervention by EEOC on a complaint in intervention alleging nationwide discrimination (see note 1, *supra*), the question presented in the present petition is of little practical significance. The claim of undue expense in defending a nationwide class action is unfounded inasmuch as litigation of the EEOC complaint would involve nationwide discovery and trial in any event. Moreover, considerations of expense alone do not warrant the issuance of a writ of mandamus. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383-384 (1953).

At all events, the decision below is correct. Petitioner's application for a writ of mandamus to decertify a class action is merely an attempt to obtain appellate review of this interlocutory, provisional order relating to class certification. Such orders are not appealable prior to final judgment. *Coopers & Lybrand v. Livesay*, No. 76-1836 (June 21, 1978); *Gardner v. Westinghouse Broadcasting Co.*, No. 77-560 (June 21, 1978).

Nor is such an order reviewable by mandamus in the circumstances of this case. Petitioner complains that the conditional certification by the district court was an abuse of discretion because the differing factual circumstances of various women employees in offices all over the country are not susceptible to manageable proof (Pet. 11-12). The court of appeals, however, found that there was

ample evidence to support the district court's provisional conclusion that there existed a sufficient commonality between jobs at various locations as well as a uniformity in centralized policies to justify a preliminary determination that the action is a class action under Rule 23(b) (Pet. App. 5a, 6a, 11a-12a). The district court's determination was made after the case was pending for more than ten months and after an extended trial on the individual claim of retaliation (see Pet. App. 15a-32a), and is subject to further consideration and possible modification as the evidence in the case develops.

Whether evaluated under the "clear abuse of discretion" standard set forth in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957), or in light of the purpose of mandamus to compel a district court to exercise its authority, *Will v. United States*, 389 U.S. 90, 95 (1967), the court of appeals' refusal to issue the writ was proper. Since petitioner's right to the writ is not "clear and indisputable," *Will v. Calvert Fire Ins. Co.*, No. 77-693 (June 23, 1978), slip op. 6 (plurality opinion), the writ was properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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